No. 12279

In the United States Court of Appeals For the Ninth Circuit

ESTATE OF DELL HINDS HIGGINS, DECEASED, SYDNEY M. HIGGINS, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

REPLY BRIEF FOR THE PETITIONER

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OPINION OF THE TAX COURT

The Memorandum Findings of Fact and Opinion of the United States (R. 113-127) are not officially reported.

JURISDICTION

The Jurisdiction remains the same as set out in Brief for the Petitioner, page 2.

QUESTIONS PRESENTED

The questions presented are the same as set out in the Brief for the Petitioner, page 3.

STATEMENT

The petitioner in this Reply Brief desires to call to the Court's attention the most noticeable errors and inconsistent statements, contained in the summary of an argument and argument presented in the Brief for the Respondent.

SUMMARY OF ARGUMENT

Contrary to the Summary of Agreement of the Respondent, the entire Record supports the contention of the Petitioner:

1. (a) That the transfer of the property placed in hands of the Trustee by the decedent Trustor was completed on March 24, 1928, and that her two children, life beneficiaries, were entitled to and did receive income each month from the trust. In fact the Record shows a part of property placed in the trust was theirs. (R. 49, 116.) Trustor's death made no change in the title to the trust property, that was determined March 24, 1928 and has remained the same from that date to the present time. The only change which has taken place since the death of the trustor is that her two children now received all of the income from the trust whereas prior to her death, March

3, 1945, they each received $75.00 a month. No transfer or conveyance of property could have been more final and complete, and out of the hands of the grantor than the property which on March 24, 1928, passed from the donor to the trustee under the provisions of the trust indenture which was irrevocable. (Resp. Br. 10.)

1. (b) That the words "comfort, well-being or education" could not have measured an external standard for the reason a Court of competent jurisdiction alone had the power to determine whether any corpus of the trust property could be used for the purpose stated. Neither the beneficiaries nor the trustee had any power or enforceable right, to determine what constituted the necessity for "comfort, well-being, or education" out of the Corpus of the trust. (Resp. Br. 10.)

1. (c) That the decedent retained no "string" whatsoever upon the trust property as the trust indenture of March 24, 1928, was irrevocable, therefore the value of the trust property is definitely not includable in the gross estate under Section 811 (c) of the Internal Revenue Code which petitioner contends is not applicable. (Resp. Br. 10.)

2. Again Petitioner must insist that there was no external standard established as no invasion of the trust property could be made by decedent or the trustee, therefore, the trust property is not includable within the grantor's gross estate under Section 811, (d) (2)

of the Internal Revenue Code which again petitioner contends is not applicable. (Resp. Br. 10.)

3. It is indeed difficult to understand why the respondent contends that the full value of the trust property is includable in the grantor's gross estate when she had no "string" upon the corpus of the trust what-so-ever and that neither she nor the trustee could invade it and the trust indenture was definitely made irrevocable therefore there was not the remotest possibility of a reversion of the trust property to the decedent. (Resp. Br. 11.)

ARGUMENT

In the first paragraph of the respondent's argument he now very graciously admits that the case, *Commissioner v. Estate of Church,* 335 U. S. 651, is not applicable to the cause now before this Court and states "The Commissioner, therefore, in the interest of the fair administration of the federal tax laws, is not urging this issue in the instant case." (Resp. Br. 11.) The petitioner's position is that neither *Church case, supra,* nor the case of *Estate of Spiegel v. Commissioner,* 335 U. S. 701, is applicable to the instant case as there was no possibility of reverter to the trustor and these two cases were the basis of the decision of the Tax Court of the United States and particularly the *Church case, supra.* The *Spiegel case, supra,* appears to be cited merely for good measure and because it involved Section 811 of the Internal Revenue Code.

Petitioner is definitely of the opinion that the *Spiegel case, supra,* has no more bearing on the issues at bar than did the *Church case, supra.* Further, if The Congress has enacted H. R. 5268, into the law, although we have not yet been advised, we believe the question will be fully answered and that the trust property will not be includable in the decedent's gross estate without other authority. This question is discussed and supported by authorities, in petitioner's opening brief, that the trust estate is not includable in the gross estate of the decedent. In support of taxpayers contention the following is quoted from The Tax Barometer and Alexander Tax News, Vol. 6. No-45, October 8, 1949:

"Pending Legislation, Paragraph 672, Estate Tax Amendments. The latest news on the status of the Senate's estate tax amendments to H. R. 5268 (Bar., V. 6, Para. 564) is that the House and Senate conferees have worked out the following agreement:

Transfers made prior to June 7, 1932, presently taxable solely because of the reservation of life interests, are exempt in the case of donors dying before January 1, 1950. No refunds will be granted where barred by the statute of limitations. Donors living on and after January 1, 1950 may surrender their life estates during 1950, free of both gift and estate tax.

Transfers made before October 3, 1949, will not be taxed merely because the donor has a possibility of reverter by operation of law or an expressly reserved

reverter worth less than 5% of the value of the property. The amendment applies to decedents dying after February 11, 1939 and refunds may be obtained despite expiration of the statute of limitations. Transfers made after October 3, 1949 will be taxed if the donees cannot obtain possession or enjoyment of the property except by surviving the donor, regardless of whether the donor retains an interest in the property."

I.

THE DECEDENT'S 1928 TRANSFER IN TRUST WAS INTENDED TO TAKE EFFECT IN POSSESSION AND ENJOYMENT AT THE TIME THE TRUST WAS CREATED AND NOT AT THE TIME OF HER DEATH AS RESPONDENT CONTENDS.

Respondent cites *Estate of Spiegel v. Commissioner,* 335 U. S. 701, decided January 17, 1949, as authority for including the trust property of this decedent in her gross estate but completely overlooks the case of *Hassett V. Welch (1938),* 303 U. S. 303, which held with reference to Sec. 302 (c) of the 1926 Revenue Act, (now Sec. 811 (c) of the Internal Revenue Code) and it had no retroactive effect and it was applicable only to transfers made on or after May 3, 1931. (Resp. Br. 11).

In citing *Helvring v. Hallock,* 309 U. S. 106; *Fidelity Co. v. Rothensies,* 324 U. S. 108; *Commissioner v. Estate of Field,* 324 U. S. 113; *Goldstone v. United*

States, 325 U. S. 687, 692; *Commissioner v. Bank of California,* 155 F. 2d 1, certiorari denied, 329 U. S. 725; *Estate of Spiegel v. Commissioner, supra;* respondent argues that the decedent's death is the indispensable event which matures or enlarges the beneficiaries' interest or the decedent has retained some "string" on the corpus which delays until her death or thereafter all of which is without merit for the reason the Trust Indenture of March 24, 1928 at the time of its creation fully, and completely determines the position of the beneficiaries as the said instrument was irrevocable without possibility of reversion. (Resp. Br. 12.)

The statement of the respondent as to the rule laid down by the Tax Court, "is that the required "string" or interest of the decedent may be supplied by the reservation of the right to have the trust corpus invaded for the grantor's benefit," is indeed inconsistent with the language used by the said Court and further to say the taxpayer does not argue to the contrary (Pet. Br. 42, 46.) is certainly not correct (See Petitioners Br. 42, 46.) The decedent had no power to invade the corpus of the trust and definitely retained no "string" upon it. (Resp. Br. 12, 13.) Respondent cites the following cases in support of his contention: *Blunt v. Kelly,* 131 F. 2d 632 (C. A. 3d) *Chase National Bank of City of New York v. Higgins,* 38 F. Supp. 858 (S. D. N. Y.), *Gallois v. Commissioner,* 4 T. C. 840, affirmed on another ground, 152 F. 2d 81 (C. A. 9th), certiorari denied, 327 U. S. 798, *Toeller's Estate v.*

Commissioner, 165 F. 2d 665 (C. A. 7th) *Champlin v. Commissioner,* 6 T. C. 280, *Estate of Rosenwasser v. Commissioner,* 5 T. C. 1043, *Commissioner v. Irving Trust Co.,* 147 F. 2d 946, 949 (C. A. 2d); but utterly fails to state that all of these cases are based on the premise that either the trustee or the trustor or possibily both had the untrammeled power of invasion, whereas in the instant cause no particular person, persons, or corporate entity, possesses that power. If the respondent would give the usual and ordinary meaning to the language used in the Trust Indenture he should readily understand why taxpayer urges that there is no clear external standard set. Also to state "The decedent possessed a power until the time of her death to revest the corpus in herself" is certainly not obtained from the provision of the Trust Indenture. (Resp. Br. 13, 14.)

The reasoning of the respondent wherein he states "The fact that the discretion in the instant case was given to a court instead of to trustee does not affect the result" is materially defective as the trustee or trustees are usually direct representatives of the trustor who has an enforceable right against the trustee if an external standard is provided, whereas in the instant case neither the trustee nor the trustor has any right of invasion whatsoever and the Court is untrammeled in its discretion. (Resp. Br. 14.)

The statement of the respondent which reads: "The California decisions require the conclusion that the trust provision in the instant case constitutes an ex-

ternal standard," is more erroneous as the decisions referred to are the *Estate of Smith,* 23 Cal. App 2d, 383, 386, wherein the Court pointed out that the soundness of the trustees discretion was reviewable and in the other case cited, *Campbell v. Folsom,* 70 Cal. App. 2d, 309, 312, wherein the Court held the soundness of the trustee's judgment was not reviewable, and as to Section 2269 of the California Civil Code, it is for the purpose only of defining or clarifying the powers of a trustee, and has no application so far as the instant case is concerned. Our trustee has no discretion, no standard set up and therefore, no right to invade the corpus for trustor or beneficiaries.

The effort of the respondent in the numerous cases cited in an attempt to build up his argument and urge that there was an external standard set, no doubt grew out of the fact that not one case exists where the matter rested in the untrammeled discretion of a court of competent jurisdiction. The cases cited by respondent are not in any way analagous to the proceeding now before this Court, and Counsel for Respondent cites no case. Counsel for the petitioner are frank to admit that they have been unable to locate such a case.

II.

THE CORPUS OF THE 1928 TRUST IS DEFINITELY NOT INCLUDABLE IN THE DECEDENT'S GROSS ESTATE UNDER SECTION 811 (d) (2), AS THAT SECTION IS NOT APPLICABLE TO THE INSTANT CASE.

Respondent's contention that Section 811 (d) (2) of the Internal Revenue Code is applicable and provides for the inclusion in the gross estate of property transferred by the decedent where the enjoyment thereof was subject at the date of her death to any change through the exercise of a power, either by the decedent alone, on in conjunction with any person, to alter, amend, or revoke, is not well founded for the reason no such condition exists in the provisions contained in the Trust Indenture.

It took far more than merely the court's approval to make a withdrawal from the corpus of the trust, it took the sound discretion of a court of competent jurisdiction and then only upon a showing of the necessity for the withdrawal. By adding the total withdrawals of $1,929.48, to the corpus inventory of $188,302.40, at the date of decedent's death, the trust property, had there been no withdrawal, would have totaled $190,-231.88, or withdrawals of 1.014277% of the total trust property for the period 1943, 1944 and 1945 to the date of decedent's death, a very negligible amount. Which indicates the extent to which the respondent is attempting to "make a mountain out of a molehill", when he

states, "the most effective way for the decedent to revoke, alter, or amend the trust was to withdraw the corpus." "She was in the process of doing this at the time of her death;" (Resp. Br. 16). The small amounts withdrawn were not by reason of any right reserved by the trustor or granted to the trustee. Respondent states "The trust instrument was twice changed so that the corpus could be invaded for the benefit of the decedent." (Resp. Br. 16.) That statement is not true. The two changes of the trust agreement by the Court were solely to make possible increase of income to the trust and thereby to avoid any application to the Court for relief.

Petitioner has never argued as stated in Brief for Respondent, pages 16 and 17, that Sections 811 (c) and (d) of the Internal Revenue Code is unconstitutional, but petitioner does take the position that the said subsections are not applicable to the trust property involved in this proceeding as the trust was created, was effective, and title to the property passed without a "string" attached thereto in any way, on March 24, 1928, and to apply a section of the code subsequently passed without being made retroactive would certainly be in contravention of the Fifth and Fourteenth Amendments to the Constitution and to support petitioner's position that the said Section as passed was not retroactive, we respectfully refer to Brief for Petitioner, pages 49, 50, 51, 52, 53. Respondent repeatedly attempts to fix the date as the year 1945, as he appears to fully realize that his argument is without merit if

he applies the law to the proper date, namely, March 24, 1928.

III.

THE VALUE AT THE DECEDENT'S DEATH OF THE TRUST CORPUS IS NOT INCLUDABLE IN THE GROSS ESTATE.

The statement by respondent wherein he used the following words, certainly conveys a different meaning than is supported by the trust indenture: "If taxability rests upon the provision of the trust instrument authorizing the trustor to apply to a court of competent jurisdiction in order to have the corpus invaded for her comfort or well-being — a provision which amounts to a possibility of reversion to the decedent— it is the value of the trust property which was subject to the decedent's possibility of reversion which is includible in the decedent's gross estate, not the value of the possibility of reversion." (Resp. Br. 17.) whereas the provisions under the trust indenture read as follows: "If it should happen during the continuance of this trust that the net income of the Trust Estate is insufficient to adequately provide for the comfort, well-being or education of any of the beneficiaries of this trust, and if such beneficiary has no other means sufficient for the purpose, then upon representation and proof of such facts to a court of competent jurisdiction and upon the order of such court resort may be had to the corpus of the Trust Estate to the extent neces-

sary to relieve the situation, and any amounts so paid out of the corpus of the Trust Estate shall be charged to the respective share of the particular beneficiary receiving such amounts." (Paragraph 7, Trust Indenture). It is submitted that there are no provisions in said instrument which would amount to a reversion of the trust property to the decedent grantor. As there is no question of the value of a reversionary interest it is difficult to understand why respondent continually insists upon the case, *Spiegel v. Commissioner, Supra* as authority to support his contention.

As for the respondent's statement which reads: "The Tax Court was therefore correct in stating (R. 126): And whatever doubt there may have been that such an invasion affecting only a part of the estate might be too insignificant to justify taxing all of it must now yield to the principle enunciated in *Estate of Spiegel v. Commissioner* . . ." petitioner contends that the Tax Court was no more correct in citing the *Spiegel case, supra,* than it was in citing the *Church case, supra,* since at the time it decided instant case it used the Church case as paramount authority for its opinion and decision. Respondent now concedes the *Church case, supra,* is not applicable to the case now before the Court.

The trust indenture did not contain any power to alter or amend as contended by the respondent (Resp. Br. 19). The said instrument speaks for itself. (Joint Exhibit 2-B).

IV.

THE DECEDENT DID NOT MAKE A TRANSFER IN CONTEMPLATION OF DEATH AS CONTENDED BY THE RESPONDENT BUT ON THE CONTRARY MADE THE TRANSFER FOR MOTIVES ASSOCIATED WITH LIFE.

The point upon which the Commissioner relied to support the inclusion of the trust property in the grantor's gross estate and upon which the Tax Court found it unnecessary to pass upon was very evident by reason of the fact that the trustor was in good health, although in an upset condition, at the time the trust was created in 1928, and lived seventeen years thereafter, and made the trust solely to prevent her husband from obtaining the property; so the creation of the trust could not have been in contemplation of death and to sustain respondent's contention cites *United States v. Wells,* 283 U. S. 102, 9 A. F. T. R. 1440 @ 1444. (Resp. Br. 19.) Petitioner desires to call attention to the substance of the rule laid down in the *Wells case, supra,* as set out in *Saunders et al v. Higgins,* 23 A. F. T. R. 701 @ 703, which reads as follows: "(6) In determining whether a transfer was made 'in contemplation of death' within the meaning of the estate tax laws, the test is always to be found in the motive of the decedent. If 'the thought of death' is the impelling cause of the transfer, then the statute applies; but if the transfer is motivated by purposes associated with life, then it can not be deemed made in

contemplation of death. *United States v. Wells,* 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867; *Becker v. St. Louis Trust Co.,* 296 U. S. 48, 56 S. Ct. 78, 80 L. Ed. 35; *Colorado National Bank v. Commissioner,* 305 U. S. 23, 59 S. Ct. 48, 83 L. Ed. 20; *Farmers Loan & Trust Co. v. Bowers,* 2 Cir., 98 F. 2d 794, certiorari denied, 306 U. S. 648, 59 S. Ct. 589, 83 L. Ed. 1047."

Respondent's statement "The decedent here was afraid that Harrow was going to cause her death in order to receive her property." (Resp. Br. 20) is without foundation as she could have made a will whereby Harrow would not have received any part of her property, or without a will under that part of Section 221—California Probate Code, which reads "221. Surviving spouse, issue. If the decedent leaves a surviving spouse, and only one child or the lawful issue of a deceased child, the estate goes one-half to the surviving spouse and one-half to the child or issue. If the decedent leaves a surviving spouse, and more than one child living or one child living and the lawful issue of one or more deceased children, the estate goes one-third to the surviving spouse and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are the same degree of kindred to the decedent they share equally, otherwise they take by right of representation." In respondent's argument he completely overlooks the fact that Harrow in the ab-

sence of a Will would, under the Code, only receive one-third of decedent's property and under a Will so worded none of her property. The object of making the trust indenture was to place decedent's property beyond the talons of her then husband and decedent's property was transferred March 24, 1928, by Trust Indenture motivated by purposes associated with life and therefore the value of the trust property is not includable in the gross estate of the decedent.

CONCLUSION

On the basis of the law and the facts, it is respectfully submitted that the findings and decision of The Tax Court of the United States should be reversed wherein it found a deficiency in estate tax of $29,009.69, and judgment should be entered for the petitioner covering the estate tax claimed of $29,009.69, and interest thereon in the sum of $4,849.45, which has been paid to the Collector of Internal Revenue of the Sixth District of California in the total sum of $33,859.14, in lieu of bond or undertaking and to stop interest from accruing in connection with the deficiency claimed, together with interest thereon from and after the date of the payment thereof, to-wit; March 16, 1949.

Respectfully submitted,

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October 24, 1949.